Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,

Petitioner,

v.

ACandS, INC., a Pennsylvania corporation, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Kevin Keaney
Counsel of Record for Petitioner
Pozzi Wilson & Atchison
1100 SW Sixth Avenue, Suite 1400
Portland, Oregon 97204-1087
Telephone: (503) 226-3232

QUESTION PRESENTED FOR REVIEW

This case presents an important question under Federal Rules of Civil Procedure 56(c) and (e): What constitutes admissible evidence to avoid summary judgment?

In opposing respondents' summary-judgment motions, petitioner submitted affidavits setting forth evidence sufficient to avoid summary judgment. Nonetheless, and contrary to Celotex Corp. v. Catrett, 477 US 317, 106 SCt 2548, 91 LEd2d 265 (1986), the district court granted summary or partial summary judgment because the evidence was submitted in a form not fully in compliance with Rule 56(e), and the Ninth Circuit Court of Appeals affirmed.

PARTIES TO THE PROCEEDING

The following are the parties: School District No. 1J, Multnomah County, Oregon (petitioner); and Fibreboard Corporation, Keene Corporation, The Flintkote Company, Armstrong Cork Company and Armstrong World Industries, Inc., United States Gypsum Company, and Owens-Corning Fiberglas (respondents). The Court should note that Keene Corporation is in bankruptcy.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Ninth Circuit's opinion is reprinted in the Appendix. The opinion addressed several issues and parties, not all of which are raised here or subject to

this proceeding. Subsequently, the Ninth Circuit denied rehearing and refused to admit a supplementary affidavit. These decisions are reprinted in the Appendix.

District Judge Helen Frye of the U. S. District Court for the District of Oregon issued opinions stating her reasons for granting summary or partial summary judgment and for refusing to admit the affidavits at issue. The opinions are reprinted in the Appendix.

JURISDICTION

The Ninth Circuit filed its opinion on September 22, 1993. Petitioner timely moved for rehearing. The Ninth Circuit denied rehearing on February 1, 1994. This petition is timely filed within the 90 days mandated in Supreme Court Rules 13.1 and 13.4.

This Court has jurisdiction under 28 USC 1254. The Ninth Circuit had jurisdiction under 28 USC 1291. The district court had jurisdiction under 28 USC 1332.

FEDERAL RULES OF CIVIL PROCEDURE AT ISSUE

Federal Rule of Civil Procedure 56(c) provides in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Federal Rule of Civil Procedure 56(e) provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto

> or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

Petitioner operates public schools in Multnomah County, Oregon (the Portland area). Petitioner sued manufacturers, including respondents, whose asbestos-containing products had been installed in its school buildings. Petitioner alleged claims for negligence, warranty, and strict liability. Jurisdiction in the district court was based upon diversity.

In January 1991, respondents moved for summary or partial summary judgments. In sum, respondents argued petitioner had no evidence their asbestos-containing products had been installed in the school buildings.

In response, petitioner conceded there were buildings in which respondents' asbestos-containing products had not been installed. For these school buildings, petitioner did not contest summary judgment.

But petitioner also submitted affidavits from its attorney, Peter W. Preston, and others contesting summary judgment.[1] Preston stated he had reviewed

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[1] Petitioner submitted affidavits from other individuals like those submitted by Preston. For instance, petitioner submitted an affidavit from a Robert Kramer. Because the affidavits were found objectionable by the district court for the same reason, the argument applicable to the Preston affidavits applies to the other affidavits and will not be repeated.

contract documents on the installation of asbestos-containing products in the school buildings and had identified from the documents which respondent's asbestos-containing products had been installed in which buildings. In addenda to the affidavits, Preston listed which respondent's asbestos-containing product had been installed in which building.

The district court excluded Preston's affidavits under Rule 56(e) because the contract documents were not attached to the affidavits. According to the district court, the absence of the contract documents meant there was no evidence to create genuine issues of material fact.

Another Preston affidavit, separate from those submitted on summary judgment, was submitted to the Ninth Circuit. In a 2-1 vote, the Ninth Circuit refused to consider the later affidavit, which addressed issues raised by respondents on rehearing.

Petitioner moved for reconsideration and submitted the contract documents--all 21,000-plus pages. Petitioner did so, not only to cure what the district court found defective, but also to rebut respondents' contentions that the contract documents could have been changed to substitute a particular respondent's asbestos-containing product with a product from another manufacturer. But the district court denied reconsideration.

The Ninth Circuit, in a 2-1 decision with Judge Ferguson dissenting, affirmed.

REASON AND ARGUMENT FOR GRANTING WRIT

THE NINTH CIRCUIT DECIDED THIS CASE IN A WAY THAT CONFLICTS WITH A DECISION OF THIS COURT.

In Celotex, this Court stated:

> We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment.

> Obviously, Rule 56(e) does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred. 477 US at 324.

In Celotex, this Court indicated the following about opposition to a summary-judgment motion: (1) Except for the "mere pleadings," the nonmoving party may submit evidentiary materials from the "list" in Rule 56(c); and (2) the evidence submitted need not be in a form admissible at trial. See also Hughes v. U.S., 953 F2d 531, 543 (9th Cir 1992) (although facts underlying affidavit must be of type admissible as evidence, affidavit need not be); United States v. Johns-Manville Corp., 259 F Supp 440 (ED Pa 1966) (failure to attach studies and recommendations referred to in

affidavit went to weight of allegations, but did not preclude admissibility).

The list in Rule 56(c) includes affidavits. If the affidavit creates a genuine issue of material fact, summary judgment should be denied.

Celotex also directed the district courts to ignore formal defects in evidentiary materials submitted in opposition to summary judgment. That is what this Court meant by stating the nonmoving party need not produce evidence in a form admissible at trial. Celotex aimed to get to the merits and to dispose of a case, if appropriate, without further ado--to separate the chaff from the wheat, as it were. That can only be done by ignoring formal defects in evidentiary materials, examining what evidence for a claim actually exists, and disposing of the

claim by granting summary judgment or sending it on for trial.

Here, for many of the dismissed claims, there is no doubt evidence exists to avoid summary judgment. Nonetheless, contrary to Celotex, the district court and Ninth Circuit relied upon a formal defect in the evidence--the absence of the contract documents--to grant or affirm the summary or partial summary judgments. That was wrong.

It was wrong because the Preston affidavits set forth evidence sufficient to avoid summary judgment. While the affidavits may not be admissible at trial, and while they do not fully comply with Rule 56(e), still they are "affidavits" within the meaning of Rule 56(c), and they set forth evidence creating genuine issues of material fact. The lower courts were wrong to grant or affirm summary judgment,

see also Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F2d 77, 80 (5th Cir 1987) (noting cases in which evidence was accepted despite "failure to meet the technical requirements of rule 56(e)"); Jackson v. Mississippi, 644 F2d 1142, 1144 (5th Cir 1981) ("Summary judgment is not * * * an automatic sanction for non-compliance with Rule 56(e)"), and this Court should take this opportunity to further delineate the Celotex rule.

CONCLUSION

For the reasons stated, the Court should grant the Petition for Writ of Certiorari.

DATED May 2, 1994.

Respectfully submitted,

KEVIN KEANEY
Counsel of Record
POZZI WILSON & ATCHISON
1400 Standard Plaza Building
1100 SW Sixth Avenue
Portland, Oregon 97204
Telephone: (503) 226-3232

Attorneys for Petitioner

SUPREME COURT, U.S.
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IN THE

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October Term 1993

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,

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ACandS, INC., a Pennsylvania corporation, et al.,

Respondents.

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Counsel of Record for Petitioner
Pozzi Wilson & Atchison
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Portland, Oregon 97204-1087
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania corporation, et al.; E.J. BARTELLS COMPANY, a Washington corporation; A.P. GREEN REFRACTORIES COMPANY,
Defendants-Appellees.

No. 91-36275
D.C. No.
CV-89-01316-FR

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania corporation, et al.,
Defendants,

and

FIBREBOARD CORP., a Delaware corporation as successor in interest to The Paraffine Companies, Inc., Pabco Products, Inc., Fibreboard Paper Products Corporation, Plant Rubber & Asbestos Works and Plant Rubber & Asbestos Co.
Defendants-Appellees.

No. 92-35127
D.C. No.
CV-89-01316-JO

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania Corporation; ARMSTRONG CORK COMPANY, INC., a Delaware Corporation; ATLAS ASBESTOS COMPANY, INC., a Canadian Corporation, et al.,
Defendants,

and

KEENE CORPORATION, a New York Corporation individually and as successor in interest to the Baldwin Ehret Hill Company,
Defendant-Appellee.

No. 92-35549
D.C. No.
CV-89-1316-REJ

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania Corporation; ARMSTRONG CORK COMPANY, INC., a Delaware Corporation; ATLAS ASBESTOS COMPANY, INC., a Canadian Corporation, et al.,
Defendants,

and

US GYPSUM COMPANY, a Delaware Corporation,
Defendant-Appellee.

No. 92-35552
D.C. No.
CV-89-1316-REJ

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania Corporation; ARMSTRONG CORK COMPANY, INC., a Delaware Corporation; ATLAS ASBESTOS COMPANY, INC., a Canadian Corporation, et al.,
Defendants,

and

OWENS-CORNING FIBERGLASS CORPORATION,
Defendant-Appellee.

No. 92-35553
D.C. No.
CV-89-1316-REJ

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania Corporation; ARMSTRONG CORK COMPANY, INC., a Delaware Corporation; ATLAS ASBESTOS COMPANY, INC., a Canadian Corporation, et al.,
Defendants,

and

FLINTKOTE COMPANY, a Delaware Corporation,
Defendant-Appellee.

No. 92-35554
D.C. No.
CV-89-1316-REJ

SCHOOL DISTRICT No. 1J, MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania Corporation; ATLAS ASBESTOS COMPANY, INC., a Canadian Corporation, et al.,
Defendants,

and

ARMSTRONG CORK COMPANY, INC., a Delaware Corporation,
Defendant-Appellee.

No. 92-35555
D.C. No. CV-89-1316-REJ
ORDER
Filed: 2/1/94

Before: FARRIS, FERGUSON and THOMPSON, Circuit Judges

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is rejected

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCHOOL DISTRICT No. 1J, MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania corporation, et al.; E.J. BARTELLS COMPANY, a Washington corporation; A.P. GREEN REFRACTORIES COMPANY,
Defendants-Appellees.

No. 91-36275
D.C. No.
CV-89-01316-FR

SCHOOL DISTRICT No. 1J, MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania corporation, et al.,
Defendants,

and

FIBREBOARD CORP., a Delaware corporation as successor in interest to The Paraffine Companies, Inc., Pabco Products, Inc., Fibreboard Paper Products Corporation, Plant Rubber & Asbestos Works and Plant Rubber & Asbestos Co.
Defendants-Appellees.

No. 92-35127
D.C. No.
CV-89-01316-JO

SCHOOL DISTRICT No. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania Corporation; ARMSTRONG CORK COMPANY, INC., a Delaware Corporation; ATLAS ASBESTOS COMPANY, INC., a Canadian Corporation, et al.,
Defendants,

and

KEENE CORPORATION, a New York Corporation individually and as successor in interest to the Baldwin Ehret Hill Company.
Defendant-Appellee.

No. 92-35549
D.C. No.
CV-89-1316-REJ

SCHOOL DISTRICT No. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania Corporation; ARMSTRONG CORK COMPANY, INC., a Delaware Corporation; ATLAS ASBESTOS COMPANY, INC., a Canadian Corporation, et al.,
Defendants,

and

US GYPSUM COMPANY, a Delaware Corporation,
Defendant-Appellee.

No. 92-35552
D.C. No.
CV-89-1316-REJ

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania Corporation; ARMSTRONG CORK COMPANY, INC., a Delaware Corporation; ATLAS ASBESTOS COMPANY, INC., a Canadian Corporation, et al.,
Defendants,

and

OWENS-CORNING FIBERGLASS CORPORATION,
Defendant-Appellee.

No. 92-35553
D.C. No.
CV-89-1316-REJ

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania Corporation; ARMSTRONG CORK COMPANY, INC., a Delaware Corporation; ATLAS ASBESTOS COMPANY, INC., a Canadian Corporation, et al.,
Defendants,

and

FLINTKOTE COMPANY, a Delaware Corporation,
Defendant-Appellee.

No. 92-35554
D.C. No.
CV-89-1316-REJ

SCHOOL DISTRICT NO. 1J, MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania Corporation; ATLAS ASBESTOS COMPANY, INC., a Canadian Corporation, et al.,
Defendants,

and

ARMSTRONG CORK COMPANY, INC., a Delaware Corporation,
Defendant-Appellee.

No. 92-35555
D.C. No. CV-89-1316-REJ
ORDER
Filed: 2/23/94

Before: FARRIS, FERGUSON and THOMPSON, Circuit Judges

The appellant's motion to submit on reconsideration the affidavit of Peter W. Preston is DENIED. Judge Ferguson would grant the motion.

CORRECTED REPRINT TO INCLUDE DISSENT

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCHOOL DISTRICT No. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania corporation, et al.; E.J. BARTELLS COMPANY, a Washington corporation; A.P. GREEN REFRACTORIES COMPANY,
Defendants-Appellees.

No. 91-36275

D.C. No.
CV-89-01316-FR

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania corporation, et al.,
Defendants,

and

FIBREBOARD CORP., a Delaware corporation as successor in interest to The Paraffine Companies, Inc., Pabco Products, Inc., Fibreboard Paper Products Corporation, Plant Rubber & Asbestos Works and Plant Rubber & Asbestos Co.
Defendants-Appellees.

No. 92-35127

D.C. No.
CV-89-01316-JO

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania Corporation; ARMSTRONG CORK COMPANY, INC., a Delaware Corporation; ATLAS ASBESTOS COMPANY, INC., a Canadian Corporation, et al.,
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KEENE CORPORATION, a New York Corporation individually and as successor in interest to the Baldwin Ehret Hill Company.
Defendant-Appellee.

No. 92-35549

D.C. No.
CV-89-1316-REJ

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,
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ACANDS, INC., a Pennsylvania Corporation; ARMSTRONG CORK COMPANY, INC., a Delaware Corporation; ATLAS ASBESTOS COMPANY, INC., a Canadian Corporation, et al.,
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US GYPSUM COMPANY, a Delaware Corporation,
Defendant-Appellee.

No. 92-35552
D.C. No.
CV-89-1316-REJ

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania Corporation; ARMSTRONG CORK COMPANY, INC., a Delaware Corporation; ATLAS ASBESTOS COMPANY, INC., a Canadian Corporation, et al.,
Defendants,

and

No. 92-35553
D.C. No.
CV-89-1316-REJ

OWENS-CORNING FIBERGLASS CORPORATION,
Defendant-Appellee.

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania Corporation; ARMSTRONG CORK COMPANY, INC., a Delaware Corporation; ATLAS ASBESTOS COMPANY, INC., a Canadian Corporation, et al.,
Defendants,

and

FLINTKOTE COMPANY, a Delaware Corporation,
Defendant-Appellee.

No. 92-35554

D.C. No.
CV-89-1316-REJ

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,
Plaintiff-Appellant,

v.

ACANDS, INC., a Pennsylvania Corporation; ATLAS ASBESTOS COMPANY, INC., a Canadian Corporation, et al.,
Defendants,

and

ARMSTRONG CORK COMPANY, INC., a Delaware Corporation,
Defendant-Appellee.

No. 92-35555
D.C. No.
CV-89-1316-REJ
OPINION

Appeal from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted
July 12, 1993—Portland, Oregon

Filed September 24, 1993

Before: Jerome Farris, Warren J. Ferguson and David R. Thompson, Circuit Judges.

Opinion by Judge Thompson; Dissent by Judge Ferguson

SUMMARY

Civil Litigation and Procedure/Evidence/Statutes of Limitation

The court of appeals affirmed a judgment of the district court. The court held that affidavits that were based in part on

cited documentary evidence but were submitted without that documentation attached were properly not considered under Federal Rule of Civil Procedure 56(e) in opposition to a motion for summary judgment.

Appellant School District No. 1J, Multnomah County, Oregon, brought suit to recover from installers and manufacturers of asbestos products allegedly placed in its schools the cost of removing those products. Appellees ACandS, Inc., and E.J. Bartells Company, sued in 1989, were installers that had last worked on District schools in 1962 and 1970, respectively. Under the ten-year state statute of ultimate repose applicable to contractors, enacted in 1971, they moved for summary judgment, which the district court granted.

In response to joint interrogatories from the manufacturers, the District compiled lists identifying each school, the asbestos product installed therein, and the number of the contract requiring the installation of that product. Based on that information, several of the manufacturers moved for summary judgment. In opposition, the District submitted several affidavits. Its attorney, Peter Preston, summarized by affidavit additional names of schools, reference numbers, and asbestos-product specifications gleaned from review of the District's contract documents. Affidavits from several people who had worked on construction of the schools identified particular products installed in particular schools, but all recited that these recollections were based in part on a review of the District's contract documents.

Some of the information in the affidavits contradicted the responses of the District to interrogatories. None of the affidavits attached the documentation to which they referred. The court excluded the affidavits either for violation of Rule 56(e)'s requirement that documentation be attached or because they were insufficiently probative and in conflict with the District's interrogatory responses. The motions were granted. The District moved for reconsideration, presenting

several boxes containing thousands of contract documents. The court held that the documents as presented did not meaningfully relate to Preston's affidavit and denied the motion. The District appealed.

[1] Unlike an action-limitation period, Oregon's statute of ultimate repose ran from the date of substantial completion or abandonment of construction without regard to the occurrence of any actual loss or injury, reflecting the state's policy judgment regarding the end of potential litigation arising from construction projects. [2] Consistent with that policy, the statute retroactively precluded suit against ACandS and Bartells for work done prior to its enactment in 1971.

[3] In the absence of other evidence, the contract documents would be necessary to persuade a jury of the manufacturers' liability. Without those documents, Preston's affidavit was merely argument without evidence. [4] Application of Rule 56(e) was not an abuse of discretion. [5] Nor were the construction workers' affidavits exempt from the attachment requirement because some of their averments were based on personal knowledge. [6] Further, the District's failure to attach documentation to their original opposition did not render the boxes of documents newly discovered evidence [7] and under the circumstances of the case, the motion for reconsideration was properly denied. [8] Since the District would have the burden at trial of proving the presence of particular products in particular schools, [9] its responses to interrogatories that no products from certain manufacturers were in certain schools was powerful evidence that those manufacturers were not liable for those schools.

Judge Ferguson dissented. As to the contractors, he contended the majority misapplied Oregon law in retroactively applying the statute of repose. As to the six "first round" manufacturers, he maintained the majority mistakenly concluded that the district court did not abuse its discretion in granting summary judgment against the School District without more

carefully reviewing documents submitted by the School District.

COUNSEL

Kevin N. Keaney, Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland, Oregon, for the plaintiff-appellant.

Ronald Scott Bemis, Stafford, Frey, Cooper and Stewart, Seattle, Washington, for defendant-appellee Fibreboard.

Joseph C. Arellano and Garr M. King, Kennedy, King, Zimmer & O'Malley, Portland, Oregon, for defendant-appellee Keene.

Stuart D. Jones and I. Franklin Hunsaker, Bullivant, Houser, Bailey, Pendergrass & Hoffman, Portland, Oregon, for defendant-appellee Flintkote.

Katherine Steele, Madden, Poliak, MacDougall & Williamson, Seattle, Washington, and John Dudrey, Williams, Frederickson, Stark & Weisensee, Seattle, Washington, for defendant-appellee Bartells.

Duane A. Bosworth, III, Ragen, Roberts, Tremaine, Krieger, Schmeer, O'Scannlain, Portland, Oregon, for defendant-appellee Armstrong Cork.

Laurie D. Kohli, George Hull and Porter, Seattle, Washington, and Janice M. Stewart, McEwen, Gisvold, Rankin & Stewart, Portland, Oregon, for defendant-appellee ACandS.

Rex Armstrong and Richard A. Hayden, Bogle & Gates, Portland, Oregon, and Thomas M. Kittredge, Morgan, Lewis & Bockius, Philadelphia, Pennsylvania, for defendant-appellee U.S. Gypsum.

William M. Tomlinson and James L. Dumas, Lindsay, Hart, Neil & Weigler, Portland, Oregon, for defendant-appellee Owens-Corning.

OPINION

THOMPSON, Circuit Judge:

These consolidated appeals arise from complaints filed by School District 1J, Multnomah County, Oregon (the "School District"). The School District sought to recover the cost of removing asbestos-containing products from over 100 school buildings. The defendants are installers and manufacturers of asbestos products. In a series of rulings in these cases, the district court granted summary judgment and partial summary judgment in favor of two installers and six manufacturers. It ordered final judgments entered as to those matters pursuant to Federal Rule of Civil Procedure 54(b). The School District appeals. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

STANDARD OF REVIEW

"A grant of summary judgment is reviewed de novo to determine, viewing the evidence in the light most favorable to the nonmoving party, whether there exist any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 712 (9th Cir. 1990).

INSTALLER DEFENDANTS

ACandS, Inc. and E.J. Bartells, Co., two of the installer defendants, installed asbestos-containing products in the School District's school buildings beginning in the 1940s.

ACandS's last installation was in 1962; Bartells's in 1970. The School District sued these installers in 1989. The district court held that the Oregon statute of ultimate repose for contractors, Or. Rev. Stat. ("O.R.S.") § 12.135(1) (1991),[1] applied to ACandS and Bartells. Under this statute, suits against contractors for defects in their work must be commenced within ten years of substantial completion or abandonment of the project. Because the School District did not file its complaint against ACandS and Bartells within ten years from the date they last installed asbestos in the school buildings, Oregon's statute of ultimate repose for contractors barred the School District's claims.

The School District contends that O.R.S. § 12.135(1) does not apply to ACandS and Bartells because they were not contractors, but rather they were distributors or suppliers of asbestos products. The School District contends its claims are product liability claims, which are exempt from any statute of ultimate repose. Alternatively, the School District argues that the Oregon statute of ultimate repose for contractors, which was enacted in 1971, does not apply retroactively to the work done by ACandS and Bartells, who completed their installation of asbestos in the school buildings by 1962 and 1970, respectively.

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[1]Section 12.135(1) reads:

> An action against a person, whether in contract, tort or otherwise, arising from such person having performed the construction, alteration or repair of any improvement to real property or the supervision or inspection thereof, or from such person having furnished the design, planning, surveying, architectural or engineering services for such improvement, shall be commenced within the applicable period of limitation otherwise established by law; but in any event such action shall be commenced within 10 years from substantial completion or abandonment of such construction, alteration or repair of the improvement to real property.

A. Are ACandS and Bartells within the ambit of O.R.S. § 12.135(1)?

During the same years that they installed asbestos in the school buildings, ACandS and Bartells also sold asbestos products directly to some consumers, without participating in any actual installation. It is undisputed, however, that the only asbestos ACandS and Bartells ever supplied to the School District was asbestos they installed in school buildings pursuant to their installation contracts. ACandS and Bartells are covered by Oregon's statute of ultimate repose for contractors, which applies to "person[s] . . . having performed the construction, alteration or repair of any improvement to real property." O.R.S. § 12.135(1).

B. Does Oregon's statute of ultimate repose for contractors apply retroactively to the installation of asbestos by ACandS and Bartells?

In resisting retroactive application of O.R.S. § 12.135(1), the School District relies on a number of cases which have held that "retroactive application of a change in the limitations period is not permitted under Oregon law absent clear contrary legislative intent." *Boag v. Chief of Police, City of Portland*, 669 F.2d 587, 588 n.* (9th Cir.), *cert. denied*, 459 U.S. 849 (1982). *See also Boone v. Wright*, 836 P.2d 727, 729 (Or. 1992); *Bergstad v. Thoren*, 738 P.2d 223, 225 (Or. App. 1987).

These cases apply only to *limitations* periods, which are distinguishable from statutes of ultimate repose such as section 12.135(1). In the typical limitations context, when an injury occurs the injured party gains a *right* to seek a recovery. This right may be exercised within the time frame of the applicable limitations period. Before applying new legislation retroactively to diminish this limitations period, Oregon requires retroactivity to be expressly intended.

[1] Unlike a limitations period, O.R.S. § 12.135(1) is a statute of ultimate repose which runs from the date of substantial completion or abandonment of construction without regard to the occurrence of any actual loss or injury. The statute reflects the policy judgment of Oregon to relieve a contractor of the risk of loss from construction projects after a substantial period of time, here ten years. As the Oregon Supreme Court stated in *Josephs v. Burns*, 491 P.2d 203, 208 (Or. 1971):

> It is in the interest of the public that there be a definite end to the possibility of future litigation resulting from past actions. It is a permissible constitutional legislative function to balance the possibility of outlawing legitimate claims against the public need that at some definite time there be an end to potential litigation.

In *Josephs*, the Oregon Supreme Court applied a statute of ultimate repose retroactively even in the absence of clear legislative direction to do so. There, the court held that O.R.S. § 12.115(1) barred the plaintiffs' claims. That statute provided: "In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of." *Id.* The alleged injury in *Josephs* was the collapse of a roof in 1969. The roof had been designed and constructed by the defendants in 1951. The statute of ultimate repose (O.R.S. § 12.115(1)) was enacted in 1967 and was held to cut off the plaintiffs' claim. *See also Philpott v. A.H. Robins Co., Inc.*, 710 F.2d 1422, 1425 (9th Cir. 1983) (O.R.S. § 30.905, eight-year statute of ultimate repose for products liability, adopted in 1977, bars claim arising from plaintiff's use of a Dalkon Shield product in 1972); *Mt. Hood Radio & Television Broadcasting Corp. v. Dresser Indus., Inc.*, 530 P.2d 72, 73 (Or. 1974) (O.R.S. § 12.115(1), adopted in 1967, bars products liability action against defendants who in 1954 built a television tower that fell in 1971).

[2] We conclude that the Oregon legislature intended O.R.S. § 12.135(1), the contractors' statute of ultimate repose, to apply retroactively. A holding that the statute, which was enacted in 1971, does not apply retroactively would expose contractors to suit in 1993 on projects completed in 1970 and before, while shielding them from suit on projects completed in 1982. The legislature could not have intended such an bizarre result.

We conclude that the district court properly granted summary judgment in favor of the installer defendants, ACandS and Bartells.

MANUFACTURER DEFENDANTS

A. Procedural History

The School District also sued numerous manufacturers whose asbestos-containing products may have been installed in its school buildings. No statute of ultimate repose protects these defendants from suit.

In January 1991, most of the manufacturer defendants moved for summary judgment or partial summary judgment. In this "first round" of motions, the manufacturers contended that the School District had no evidence to establish that particular asbestos-containing products of particular manufacturers were in particular school buildings. For example, Owens-Corning Fiberglass ("OCF") contended that no evidence established that any OCF asbestos products were installed in the Whitaker school, nor in five other schools. Of the first round motions granted in favor of the manufacturers, the School District appeals six.[2]

[2]Twelve manufacturers filed for summary judgment or partial summary judgment. Nine motions were granted by the district court in their entirety, two were granted in part and denied in part, and one was denied. The School District appeals six of the nine.

The context in which the district court ruled on the first round of motions helps explain its decision to grant summary judgment. The motions were preceded by a discovery battle over product identification. The manufacturers had served joint interrogatories on the School District. One interrogatory requested a building-by-building breakdown showing which manufacturers' asbestos products had been installed in which buildings, accompanied by supporting data such as the location and quantity of each product within each building. The School District objected to the form of this interrogatory and refused to answer. The district court held a discovery management conference and ordered the School District to supply the manufacturers with the following information in a building-by-building list:

(1) the name of the product installed;

(2) the location of the product within the building;

(3) the amount or quantity of the product within the building; and

(4) a summary of the documentary evidence supporting the product identification.

The School District conducted a "product identification survey" and in December 1990 complied, at least in part, with the district court's order. The School District prepared lists showing each school's name, the asbestos product allegedly installed in it, and the reference number of the construction contract requiring installation of that asbestos product.

The first round motions followed. In support of the motions, each manufacturer contended discovery had shown that its asbestos products had not been installed in numerous schools. In response to some of the motions, the School District conceded that there were schools in which no asbestos products of a particular manufacturer had been installed.

However, it contested most of the first round motions, including the six before us in these appeals.

The School District's opposition to the six motions relied principally on the affidavits of its attorney, Peter W. Preston. Preston stated he had reviewed the School District's contract documents and had determined that where the School District was contesting a particular manufacturer's motion, the contracts called for installation of an asbestos product in a school building. Thus, in addition to the schools identified in the interrogatory responses (which were generally not at issue in the first round motions), Preston identified other schools that contained asbestos products of the six manufacturers. Preston attached lists to his affidavits identifying the school, the contract reference number and the contract specification requiring an asbestos product. For example, in opposition to the motion of U.S. Gypsum, the list attached to one of Preston's affidavits read in part:

School	Contract Number	Specification
Abernathy	493	513-13
	780	1006-5
Ainsworth	508	314
	1155	27-24
	1155	15-11
	1691	Keenes & Bondcrete

The district court excluded the Preston affidavits under Federal Rule of Civil Procedure 56(e), because the contract documents referred to in his affidavits were not attached to them. Rule 56(e) requires that documents relied upon in an affidavit presented in a summary judgment motion or opposition thereto be attached to the affidavit.[3] Without the Preston

[3]Rule 56(e) reads in part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in

affidavits, and because of deficiencies in other evidence proffered by the School District,[4] the School District had no evidence to create a genuine issue of material fact in opposition to the manufacturers' motions for summary judgment.

The School District then moved for reconsideration. With this motion it submitted more than 21,000 pages of contract documents. These contract documents were presented to the court in various boxes. The district court found that the unorganized boxes of contracts did not "correspond in any meaningful manner" to the original Preston affidavits, and it denied the School District's motion for reconsideration.

Thereafter, two manufacturers filed "second round" motions for summary judgment. These motions pertained to schools not involved in the first round motions. The district court determined that the evidence supplied by the School District in opposition to the second round motions was not sufficiently probative and conflicted with the School District's earlier responses to the manufacturers' joint interrogatories. The court granted the second round motions for summary judgment.

B. Exclusion of the Affidavits

Evidentiary questions, although decided in the context of summary judgment, are reviewed for abuse of discretion. *See*

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evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. *Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.*

Fed. R. Civ. P. 56(e) (emphasis added).

[4]In two instances, former asbestos workers also supplied affidavits indicating that particular products were in some school buildings. Because these affidavits referenced contract documents which were not attached, the district court excluded them as well.

Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1552 (9th Cir. 1989) (reviewing a hearsay challenge to an affidavit under an abuse of discretion standard). The district court's decision to exclude the Preston affidavits for a failure to comply with the attachment requirement of Rule 56(e) is in the nature of a ruling excluding evidence. Accordingly, we review that decision for abuse of discretion.

When a party opposing summary judgment fails to comply with the formalities of Rule 56, a court may choose to be somewhat lenient in the exercise of its discretion to deal with the deficiency. *See, e.g., Scharf v. United States Attorney Gen.*, 597 F.2d 1240, 1243 (9th Cir. 1979); *United States v. Western Elec. Co., Inc.*, 337 F.2d 568, 575 (9th Cir. 1964); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (nonmoving party need not produce affidavits in a form admissible at trial). However, discretionary leniency does not stretch so far that Rule 56(e) becomes meaningless. *See Peterson v. United States*, 694 F.2d 943, 945 (3d Cir. 1982) (failure to attach key document to affidavit violated Rule 56(e) and made summary judgment improper); *see also Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) (unauthenticated documents may not be relied upon to defeat a motion for summary judgment).

[3] Here, due to the absence of other evidence, the contract documents would have been necessary to persuade a jury that asbestos was in the school buildings to which the first round of motions applied, yet the School District did not provide these documents to the district court with the Preston affidavits. Lacking this documentation, Preston's affidavits were nothing more than an attorney's argument lacking evidentiary support.

The School District contends on appeal that the attachment of the contracts would have been unduly costly or burdensome. The record indicates, however, that some partial excerpts of contracts were provided in opposition to the first

round of summary judgment motions by the manufacturers. When this was done, the district court denied the manufacturers' motions as to the applicable schools. Further, thousands of pages of documents were eventually submitted with the motion for reconsideration. It was not too costly or burdensome then to provide the documents.

[4] We conclude that the district court did not abuse its discretion when it refused to consider the Preston affidavits due to the failure to comply with Rule 56(e).

Nor did the district court abuse its discretion in excluding other affidavits for violations of Rule 56(e). In the case of Owens-Corning Fiberglass, this led to summary judgment in its favor on the issue whether its products had been installed at the Whitaker school. In the School District's opposition to this motion, it introduced the affidavit of Lon Applegate. Applegate had worked for contractors who had installed asbestos at Whitaker. He said in his affidavit that he had installed OCF products at Whitaker. He recalled installing OCF products at the school based on his "work at various schools and/or a review of the contract materials." No contracts were attached to the affidavit. The district court concluded that the Applegate affidavit violated Rule 56(e).

[5] Unlike the attorney Preston, Applegate was an asbestos worker with personal knowledge of the installation of OCF asbestos. However, an affidavit of a witness is not exempt from Rule 56(e)'s attachment requirement simply because the affidavit references documentary evidence *and* personal knowledge as a source of information. If documentary evidence is cited as a source of a factual contention, Rule 56(e) requires attachment. There was no attachment. The district court did not abuse its discretion in excluding the Applegate affidavit.

Keene Corporation was granted summary judgment on the issue whether its products had been installed at nine schools.

In opposition, the School District provided the affidavit of another asbestos worker, Robert Kramer. Kramer stated that a Keene product had been installed in eight of the nine schools. Relying on his visual inspection, Kramer also stated that asbestos remained in the eight schools. He further stated the information in his affidavit was derived from his "experience as an asbestos installation mechanic, my work on various schools and/or a review of the contract materials." Again, the School District failed to attach the contract materials to the affidavit. The requirement of Rule 56(e) was not met. The district court did not abuse its discretion in excluding the Kramer affidavit.

In sum, we affirm the district court's first round grants of summary judgment for OCF (6 schools), for Armstrong Cork/Armstrong World (29 schools), for U.S. Gypsum (53 schools), for Fibreboard (16 schools), for Flintkote (11 schools), and for Keene (9 schools, including Alameda and Bridlemile).

C. Denial of the Motion to Reconsider

A district court may reconsider its grant of summary judgment under either Federal Rule of Civil Procedure 59(e) (motion to alter or amend a judgment) or Rule 60(b) (relief from judgment). Under either theory our review of a denial of a motion to reconsider is for abuse of discretion. *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441 (9th Cir. 1991); *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

The School District relied on Rule 59(e). Along with its motion to reconsider, it filed over 21,000 pages of contract documents. These documents included hundreds of construction "change orders," which allegedly indicated that the asbestos products specified in the contracts to which the change orders related were in fact used in the applicable school buildings. The School District argues this filing cured its earlier failure to comply with Rule 56(e)'s attachment

requirement. It contends that the district court abused its discretion by refusing to consider the contract documents and in refusing to reverse its earlier summary judgments.

Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. *See All Hawaii Tours, Corp. v. Polynesian Cultural Center*, 116 F.R.D. 645, 648 (D. Hawaii 1987), *rev'd on other grounds*, 855 F.2d 860 (9th Cir. 1988). There may also be other, highly unusual, circumstances warranting reconsideration.

[6] The overwhelming weight of authority is that the failure to file documents in an original motion or opposition does not turn the late filed documents into "newly discovered evidence." *See Waltman v. International Paper Co.*, 875 F.2d 468, 473-74 (5th Cir. 1989) (materials available at time of filing opposition to summary judgment would not be considered with motion for reconsideration); *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1557 & n.4 (9th Cir. 1987) (court did not abuse its discretion in refusing to consider affidavits opposing summary judgment filed late); *Frederick S. Wyle Professional Corp. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985) (evidence available to party before it filed its opposition was not "newly discovered evidence" warranting reconsideration of summary judgment).

[7] The district court's refusal to reconsider its earlier ruling may have been harsh. The court could have appointed a special master to conduct a thorough review of the 21,000 pages of contract documents to see which of them may have corresponded in a meaningful way to the averments of the Preston affidavits. The contract documents, however, and the process by which their relationship to the Preston affidavits could have been established, had been available to the School District from the beginning of the case. On a prior occasion, the court had found it necessary to enter an order compelling

the School District to comply with the court's discovery order. The contract documents, even in their condition of disarray, were only produced after a discovery dispute. The documents were not presented to the court until the School District presented its motion for reconsideration. In this circumstance, we cannot say that the district court abused its discretion in not further indulging the School District or in not attempting by some other means to deal with the overwhelming presentation of 21,000 pages of contract documents. *See Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 883 (9th Cir. 1982) ("A party may not prevail in opposing a motion for summary judgment by simply overwhelming the district court with a miscellany of unorganized documentation."), *cert. denied*, 460 U.S. 1085 (1983).

If the School District's motion to reconsider could be deemed a Rule 60(b) motion, relief would still be unavailable. Rule 60(b) "provides for reconsideration only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief." *Fuller*, 950 F.2d at 1442. None of these potential grounds for relief is applicable here.

D. The Second Round of Motions

OCF and Fibreboard contended in support of their second round of summary judgment motions that certain of the remaining schools for which they were potentially liable had not been identified on the School District's response to the manufacturers' joint interrogatories on product identification. OCF's second round motion pertained to two schools; Fibreboard's to seven. In opposing these motions, the School District argued that asbestos manufactured by OCF and Fibreboard were in the schools despite the School District's failure to identify them in its previous interrogatory response.

The court granted summary judgment in favor of OCF and Fibreboard.

OCF and Fibreboard argue we should uphold the district court's summary judgment because, according to them, summary judgment was entered as a sanction against the School District because it failed to comply with the court's discovery orders as to product identification. This argument lacks merit. There is no indication in the record that the School District was sanctioned.

OCF and Fibreboard also contend that summary judgment was proper because the affidavits the School District submitted with its opposition to their motions conflicted with the School District's earlier interrogatory response, and the School District should be bound by the earlier response which failed to identify the subject schools as schools containing OCF and Fibreboard asbestos products. In support of this argument, OCF and Fibreboard rely on cases in which we have held that a party should not be able to substitute an affidavit alleging helpful facts for earlier deposition testimony harmful to its case in order to avoid summary judgment. *See Foster v. Arcata Assocs., Inc.*, 772 F.2d 1453, 1462 (9th Cir. 1985); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 544 (9th Cir. 1975).

The *Foster-Radobenko* rule applies to conflicts between affidavits and interrogatory responses as well as deposition testimony. However, we have held that *Foster-Radobenko* should be applied with caution. *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). "[T]he *Foster-Radobenko* rule does not automatically dispose of every case in which a contradictory affidavit is introduced to explain portions of earlier deposition testimony." *Id.* at 266-67. The district court must make a finding of fact that the affidavit was a "sham." *Id.*

Here, the district court ruled on the second round motions without the benefit of our decision in *Kennedy*. It therefore

contract documents. Kramer's testimony is emasculated by the School District's clear interrogatory response directly to the contrary. His affidavit, therefore, does not pass the "significantly probative" test of *Liberty Lobby*. No reasonable juror could rely upon it to conclude that OCF asbestos was installed at the Edwards school. Thus, there is no genuine issue for trial on this issue and summary judgment in favor of OCF with regard to the Edwards school was proper.

The School District contends that an OCF asbestos product was installed at Jefferson school. It relies on the affidavit of Earl Claus, an asbestos worker. Claus recalled installing OCF asbestos at Jefferson in 1958. The School District's earlier, detailed interrogatory response, however, states that *Armstrong* asbestos products and OCF *non*-asbestos products were installed at Jefferson. Claus's affidavit, based on distant memory, is not significantly probative in light of the contradictory interrogatory response. Summary judgment as to the Jefferson school was appropriate.

The School District contends that Fibreboard asbestos products were installed at Bridger, Gregory Heights, Monroe, Sellwood and Woodmere schools. As evidence, the School District introduced "subcontracts" between the School District and Columbia Asbestos Supply. These "subcontracts" allegedly require the installation of asbestos at these five schools. Columbia was the exclusive distributor for Fibreboard during the relevant time. However, the "subcontracts" are not probative evidence. These documents were not subcontracts at all, but were merely proposals for work to be done by Columbia. Additionally, the allegation that Fibreboard asbestos was in the five schools contradicted the School District's earlier interrogatory response. We conclude that the district court correctly granted summary judgment in favor of Fibreboard as to these five schools.

The School District contends that a Fibreboard asbestos product was installed at the Duniway school. In support of

this contention, the School District introduced the Fibreboard-Columbia Asbestos Supply exclusive distributorship contracts and the affidavit of Harold Davis, a worker who had installed asbestos for Columbia at the Duniway school. Davis stated that he had installed asbestos products at Duniway in 1948 or 1949, but he did not say he installed any Fibreboard product. Further, the exclusive distributorship contract between Fibreboard and Columbia did not begin until 1951. Given this evidence, and the School District's contradictory interrogatory response, no reasonable juror could conclude that a Fibreboard product was installed at Duniway.

Finally, the School District contends that a Fibreboard product was installed at the Sitton school. The School District introduced an affidavit from Robert Kramer. In 1991, Kramer inspected the Sitton school and found an asbestos cement product called Kaylo inside. Kaylo was manufactured by Fibreboard from 1960 to 1971, and by OCF before that. The Kramer affidavit does not disclose when the asbestos was installed or which of the two companies manufactured it. Further, the affidavit conflicts with the School District's earlier interrogatory response which exonerated Fibreboard from having provided asbestos at Sitton. Summary judgment was appropriate.

CONCLUSION

The district court's summary judgments in favor of ACandS and Bartells pursuant to Oregon's statute of ultimate repose for contractors, O.R.S. § 12.135(1), are affirmed. The district court's summary judgments and partial summary judgments in favor of OCF, Fibreboard, Armstrong, Keene, U.S. Gypsum and Flintkote are also affirmed, as is the district court's order denying reconsideration of its summary judgments.

AFFIRMED.

FERGUSON, Circuit Judge, Dissenting:

I dissent from the majority's opinion both as to the contractors and the six "first round" manufacturers. Regarding the former, the majority misapplies Oregon law when it retroactively applies the statute of repose. Regarding the latter, the majority mistakenly concludes that the district court did not abuse its discretion when it ruled against the School District at summary judgment based on an unprecedented application of Rule 56(e).

I.

The majority concludes that the Oregon statute of repose applies retroactively to bar the School District's claims against the contractors. Yet the rule applied in Oregon courts is that "in the absence of legislative direction to the contrary . . . a statute that affects 'legal rights and obligations arising out of past actions' can only be applied prospectively. *Bergstad v. Thoren*, 738 P.2d 223 (Or. App. 1987). The statute of repose at issue here does not provide for retroactive application. *See* Or. Rev. Stat. § 12.315(1). Thus the correct answer plainly is that the statute does not apply retroactively.

The majority supports its opposite conclusion by citing cases in which Oregon courts have applied statutes of repose retroactively. However, none of these cases address the issue of retroactivity. *See Joseph v. Burns*, 491 P.2d 203, 204 (Or. 1971); *Mt. Hood Radio & Television Broadcasting Corp. v. Dresser Indus., Inc.*, 530 P.2d 72, 73 (Or. 1974). Thus these cases are insufficient to counter the weight of Oregon authority to the contrary. *See Boone v. Wright*, 836 P.2d 727, 729 (Or. 1992) ("Oregon has followed this well recognized rule for over a century: A statute that shortens a limitations period applies prospectively if the legislature does not clearly express a contrary intent.") Furthermore, at least one other state facing the same issue has explicitly decided that statutes

of repose cannot be applied retroactively. *See Lotter v. Clark County*, 793 P.2d 1320, 1323 (Nev. 1990).

Finally, the majority's policy argument is unconvincing. The "public" does not benefit if contractors can escape liability. To the contrary, the public may well suffer, as it does in this case, by having to pay for things like the removal of cancer causing materials from public school buildings. Furthermore, Oregon has expressly exempted products liability claims for damages from asbestos-related disease from statutes of repose limitations. *See* Or. Rev. Stat. §§ 30.905, 907. Although this exemption covers only personal injury claims and thus does not apply to the School District's cause of action, it is relevant as evidence that the Oregon legislature has considered the majority's policy arguments and rejected them in the asbestos context.

II.

I must also differ with the majority's conclusion that the district court did not abuse its discretion when it excluded the affidavits of Peter Preston because the contract specifications referred to in his affidavits were not attached, as required by Fed. R. Civ. P. 56(e). We follow the rule that the affidavits of a party opposing summary judgment are treated with lenience. *See Scharf v. United States*, 597 F.2d 1240, 1243 (9th Cir. 1979); *Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985) ("as a general principle we treat the opposing party's papers more indulgently than the moving party's papers.")

Despite acknowledging this rule, the majority fails to apply it. The majority cites several cases in support of its conclusion that the district court did not abuse its discretion, but these cases provide no support for deviating from the rule of leniency. In *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1552 (9th Cir. 1989), we upheld a district court's grant of summary judgment despite the district court's

failure to require compliance with Rule 56(e). In *Peterson v. United States*, 694 F.2d 943, 945 (3d Cir. 1982), the Third Circuit *reversed* a grant of summary judgment for the government when it failed to comply with Rule 56(e). Finally, *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) is not directly on point, because the issue there was whether unauthenticated documents could be relied on to defeat a motion for summary judgment.

Here, the only defect in the Preston affidavits was the failure to attach the 21,000 pages of contract documents. The School District would have been wiser to attach the documents in the first place, but its failure to do so should not prompt the harsh result of summary judgment. *See Jackson v. Mississippi*, 644 F.2d 1142, 1144 (5th Cir. 1981) ("Summary judgment is not an automatic sanction for non-compliance with Rule 56(e).").

The Preston affidavits were apparently specific as to each school and each contractor, and clearly would raise a genuine issue of fact as to at least some of the contractors. Where the contract specifications referred to in the affidavits require the use of a single asbestos product, it is evident that summary judgment would be improper.

After the district court granted summary judgment, the School District copied the contract documents, submitted them as attachments to the Preston affidavits, and moved the court to reconsider its entry of summary judgment. The district court refused, finding that the evidence was not "newly submitted," and that the documents were not arranged in compliance with Rule 56(e). The district court did not review any of the attached documents. Again, the district court abused its discretion.

The documents were not disorganized. They were voluminous, but that alone should not exclude them from consideration. As the district court was well aware, there were close

to one hundred school buildings involved, as well as a multitude of manufacturers. Numerous documents were therefore inevitable. The School District attached an addendum to its motion that served as a table of contents for the documents and organized the documents by contract number and school building. Therefore the district court presumably could have referenced the contracts mentioned in each affidavit without undue difficulty. *Compare Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 883 (9th Cir. 1982) (appellant presented the court with "a miscellany of unorganized documentation" which was not accompanied by affidavits explaining the contents).

While I am sympathetic to the district court's work load, I cannot conclude that it is within the district court's discretion to frustrate prematurely a litigant's claim simply because supporting documents require a reasonable amount of effort to peruse.

I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SCHOOL DISTRICT No. 1J MULTNOMAH COUNTY, OREGON,	)	Civil No. 89-1316-FR (LEAD)
Plaintiff,	)	
v.	)	Civil No. 90-753-FR
ACandS, INC., a Pennsylvania corporation, et al.,	)	Consolidated Cases
Defendants.	)	O P I N I O N Entered: 9/27/91

* * * * *

FRYE, Judge:

The matter before the court is the motion of plaintiff, School District No. 1J Multnomah County, Oregon (the School District), for new trial (#289-1), alteration for amendment of judgment (#289-2) or for reconsideration (#289-3) or rehearing (#289-4).

BACKGROUND

On December 1, 1989, the School District filed this action against the defendants based upon strict liability,

negligence, and breach of warranty. The School District alleges that it has been damaged by the asbestos-containing products manufactured by, distributed by, and/or installed by the named defendants in the School District's buildings.

In January, 1991, twelve defendants filed motions for summary judgment on the grounds that the School District failed to show that the asbestos-containing products of each of these defendants had actually been installed in the School District's buildings. The School District moved for an extension of time until May 1, 1991 in which to respond to the motions of these defendants for summary judgment. The court granted the motion of the School District for an extension of time to respond.

In response to defendants' motions for summary judgment, the School District took the position that evidence that a product of a defendant was identified in the

contract specifications for a building was evidence adequate to defeat a motion for summary judgment as to that building. The School District submitted to the court the affidavit of counsel stating that he had reviewed the contract specifications and determined that the products of the defendants were listed in the specifications. In a number of instances, the School District submitted a document referred to as an "addendum" which listed a school and contained columns labelled "product," "contract number," and "specification." For example:

School	Product	Contract No.	Specification
Peninsula	Cement	1061	1714

Addendum to the affidavit of Peter W. Preston (attached to the Memorandum in Opposition to Fibreboard's Motion for Partial Summary Judgment)

In a few instances, the page of the contract containing the contract specification which identified a product of

a defendant was attached to the memorandum in opposition to the defendant's motion for summary judgment, but for the most part the pages of the contract documents containing the specifications which the School District relied upon to oppose the defendants' motions for summary judgment were not included in the materials submitted to the court by the School District in opposition to the defendants' motions for summary judgment.

In their reply, the moving defendants took the position that the contract specifications were not adequate to carry the burden of the School District to prove that the products of the defendants were installed in the school buildings. The moving defendants specifically objected to the failure of the School District to comply with the requirements of Fed. R. Civ. P. 56(e) that "[s]worn or certified copies of all papers or parts thereof

referred to in an affidavit shall be attached thereto or served therewith." The moving defendants argued to the court:

> Plaintiff's counsel's affidavits failed to attach the very papers (e.g., contract spec documents) which he relies upon and refers to only by addenda lists. This failure is fatal to plaintiff's opposition. References in affidavits to papers not attached "should have been disregarded" on summary judgment motion.

Joint Reply Memorandum of Moving Defendants for Summary Judgment,. p.10, lns. 7-12.

The motions of the defendants for summary judgment were heard by the court on May 20, 1991. At the time of oral argument on these motions, the defendants repeatedly argued that even if the contract specifications were adequate to avoid a motion for summary judgment, the School District had failed to submit competent evidence of the contract specifications.

At the time, the School District argued that "[t]he attorney's affidavit was meant to reasonably approach the proof

meant to satisfy the spirit and the intent of the motion for summary judgment." Transcript of Proceedings, P. 24, lns. 20-23. Furthermore, the School District agreed with the defendants that the record is "closed today" without supplementation. Id. at p. 3.

The Court took the matter under advisement, and on June 20, 1991, the court filed an opinion in which it found that a contract specification was adequate to raise a material issue of fact for the trier of fact. In those instances in which the page of the contract containing the specification was included in the record, and even in those instances in which the page of the contract containing the specification was not properly authenticated, the court denied the defendant's motion for summary judgment. See e.g., Opinion at 16 (documents appearing to be contract specifications

attached to memorandum in response to the motion of Georgia-Pacific for partial summary judgment). In the one instance in which the School District submitted the face sheet of the contract at issue and submitted the single page of the contract specification upon which the School District relied, the court readily denied the defendant's motion for summary judgment despite the fact that the documents were not properly identified through an affidavit. Opinion at 20.

The court found, however, that it could not overlook the total failure of the School District to enter into the record the contract specification upon which the School District was relying. The court concluded that the affidavit of counsel and the documents attached to the affidavit and referred to as an "addendum" did not meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure and

granted the defendants' motions for summary judgment on the grounds that there was no competent evidence in the record of the existence of the contract specifications in those instances in which the contract specifications were not included in the record.

The School District now moves the court to reconsider its order of June 20, 1991 granting defendants' motions for partial summary judgment and summary judgment.

CONTENTIONS OF THE PARTIES

The School District moves the court for an order granting reconsideration of the court's order of June 20, 1991 on the grounds that the court failed to consider all of the evidence, failed to correct clear error, and failed to prevent manifest injustice. The School District submits to the court in support of the motion for reconsideration true and accurate copies of

contracts, totalling 21, 218 pages, listed in an addendum by contract number and by school. The School District argues that the motions of the defendants for summary judgment should now be denied because "significant effort and expense has now been expended to comply with the highly technical requirements cited as shortcomings by this Court." Plaintiff's memorandum in Support of Motion for New Trial, Alteration for Amendment of Judgment or for Reconsideration or Rehearing, p. 5, lns. 19-21.

The School District contends that reconsideration should be granted in order to prevent manifest injustice because the prior order of the court resulted in dismissal of claims when in actuality the facts would support those claims. The School District points out that the contracts in full are now before the court, and therefore reconsideration is required.

Defendants oppose the motion for reconsideration on the grounds that the additional documents presented in support of the motion for reconsideration were available to the School District before it filed its opposition to defendants' motions for summary judgment. In addition, defendants argue that the evidence submitted is against insufficient under law to create a genuine issue of material fact because while the School District has submitted 21, 218 pages of documents, it has failed to identify those specific documents upon which it relies, and neither defense counsel nor the court can make a reasonable review of all of these pages of documents.

APPLICABLE LAW

A motion for reconsideration must demonstrate some reason why the court should reconsider its decision. The motion must set forth facts or law of a strongly

convincing nature to induce the court to reverse its prior decision. Courts have distilled three major grounds justifying reconsideration: (1) an intervening change in controlling law; 2) the availability of new evidence; and 3) the need to correct clear error or prevent manifest injustice. All Hawaii Tours Corp. v. Polynesian Cultural Ctr., 116 F.R.D. 645, 648 (D. Haw. 1987), rev'd in part on other grounds, 855 F.2d 860 (9th Cir. 1988).

A party moving for reconsideration of a grant of summary judgment based upon the availability of new evidence is "obliged to show not only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence at the hearing." Engelhard Indus. v. Research Instrumental Corp., 324 F.2d 347, 352 (9th Cir. 1963); see also Frederick S. Wyle P.C. v. Texaco,

Inc., 764 F.2d 604, 609 (9th Cir. 1985); Trentacosta v. Frontier Pac. Aircraft Indus., 813 F.2d 1553, 1557-58 n.4 (9th Cir. 1987).

ANALYSIS AND RULING

The School District contends that the court applied the requirements of Rule 56(e) of the Federal Rules of Civil Procedure in a highly technical manner resulting in manifest injustice to the School District.

Rule 56(e) of the Federal Rules of Civil Procedure requires that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." The failure of the School District to comply with this requirement was repeatedly brought to the attention of the School District and to the attention of the court by the defendants. The application of Rule 56(e) is not a highly technical

application, and there was no error by this court in requiring that the terms of the rule be followed.

In summary, the School District has not presented to this court any facts or any law which support reconsideration and reversal of the orders granting full or partial summary judgment in favor of the defendants involved in this motion. It is clear from the court's opinion and order of June 28, 1991 that the court would require the School District to identify the contracts and to provide the court with evidence of the properly authenticated contract specifications relied upon to support the claims of liability against the individual defendants. The memorandum and the 21,218 pages of documents provided by the School District to this court do not satisfy this basic requirement. The documents filed with this motion for reconsideration do not appear to correspond

in any meaningful manner to the materials provided in opposition to the motion or to identify in any meaningful manner the documents which the School District now relies upon in opposition to defendants' motions for summary judgment.

CONCLUSION

The School District's motion for new trial (#289-1), alteration for amendment of judgment (#289-2) or for reconsideration (#289-3) or rehearing (#289-4) is DENIED.

DATED this 25th day of September 1991.

/s/ HELEN J. FRYE
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SCHOOL DISTRICT No. 1J MULTNOMAH COUNTY, OREGON,	)	Civil No. 89-1316-FR (LEAD)
Plaintiff,	)	
v.	)	Civil No. 90-753-FR
ACandS, INC., a Pennsylvania corporation, et al.,	)	Consolidated Cases
Defendants.	)	O P I N I O N Entered: 6/21/91

* * * * *

FRYE, Judge:

* * * * * [Here all the motions for summary judgment were listed.]

BACKGROUND FACTS

The plaintiff, School District No. 1J Multnomah County, Oregon (the School District) brings this action against the defendants based upon strict liability, negligence amd [sic] breach of warranty. The School District alleges that it has been damaged by the asbestos-containing products supplied by these defendants to

the School District for use in its school buildings.

the School District owns some 105 buildings which are used as elementary schools, middle schools, high schools and other instruction centers. On June 18, 1990, this court ordered the School District to identify in its responses to the interrogatories served upon the School District by the defendants each of the school buildings in which the product of each of the defendants was allegedly installed. On December 3, 1990, the School District returned its responses to the interrogatories served upon it by the defendants.

Each of the twelve moving defendants seeks an order of summary judgment with prejudice in its favor as to all of those buildings in the School District where that defendant's product was not listed as a "product installed" on the School

District's responses to interrogatories and the exhibits attached thereto and as to all of those school buildings for which there is no proof of the actual installation of that defendant's product other than the contract specifications.

The School District appears to concede in its responses that summary judgment may be granted as to any defendant where that defendant's product was not listed as a product installed in any given school building. However, the School District opposes summary judgment for any defendant where that defendant's product was identified in the contract specifications for any building.

The contract specifications used by the School District for the construction, alternation and remodelling of school buildings indicate the product to be installed and the manufacturer of that product and in certain instances use the

words "or approved equal" after the product is identified.

A contract specification used by the School District becomes a part of the contract between the School District and the supplier after the contract is executed. If a contract specification calls for the specific product of a specific manufacturer to be installed, but uses the words "or approved equal," it has been the custom and practice of the School District to require that the product specified be used by the contract. It has also been the custom and practice of the School District since 1951 that a contractor who desires to use an "approved" equal must take written application to the architect for approval of a product other than the product specified, and that the architect must approve in writing the request of the contractor for use of a product other than the product specified.

If a contract specification called for a specific manufacturer, the product of that manufacturer must have been installed unless the contractor made a written request to substitute the product of another manufacturer and the architect approved the substitution in writing.

CONTENTIONS OF THE PARTIES

The moving defendants contend that 1) as to the majority of the school buildings, there is no indication that the products of the moving defendants were either specified for installation or listed as actually installed; and 2) to the extent that the School District relies on contract specifications as evidence of what was actually installed, the specifications are speculative.

The defendants argue that the contract specifications alone are insufficient to prove that the product of a particular defendant was installed in a specific

school building because the contract specifications alone are insufficient to establish the element of causation in the School District's theories of recovery. The defendants contend that contract specifications are evidence only of the requested or suggested product, and not the product that was in fact installed.

The defendants rely in particular upon Catasauqua Area School Dist. v. Raymark Indus., 662 F. Supp. 64 (E.D. Pa. 1987), in which the issue was whether there was sufficient evidence to show that asbestos-containing roofing felts manufactured by Bird & Son were installed in a high school during its construction. In that case, the plaintiff relied "primarily on a materials list of products approved for installation." Id. at 65. The court reviewed the evidence presented by both parties and concluded "[i]n sum, the cumulative value of plaintiff's evidence is

simply insufficient to establish that Bird's products were actually present in the high school." Id. at 66.

The School District responds that the specification of a single product, or its equal, creates the rebuttable presumption that the specified product was installed. The School District contends that the contract specifications became a part of the contract between the School District and its suppliers, and the law of the State of Oregon is that persons are presumed to have carried out their oral and written contracts. Multnomah County v. Dant & Russell, Inc., 158 Or 350, 75 P.2d 986 (1938). The School District argues that when there is a contractual requirement that a party perform, absent evidence to the contrary, it is presumed that the party completed its obligations under the contract.

APPLICABLE STANDARD

Summary Judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. Hector v. Wiens, 533 F.2d 429, 432 (9th Cir. 1976).

ANALYSIS

The factual circumstances surrounding the motions for summary judgment of each

defendant require that the court addresss [sic] each motion separately.

1) Motion for Summary Judgment of Defendant T&N plc

* * * * *

2) Motion for Partial Summary Judgment of Defendant GAF Corporation

* * * * *

3) Motion for Partial Summary Judgment of Defendant Owens-Corning Fiberglas

Defendant Owens-Corning Fiberglas (Owens-Corning) moves the court for summary judgment dismissing all of the claims of the School District against Owens-Corning with respect to all of the school buildings except for six (Abernathy, Capitol Hill, Edwards, Jefferson, Lents and Sitton), which are not the subject of this motion. Owens-Corning moves for summary judgment as to all other school buildings, including those school buildings where the asbestos-containing products of Owens-Corning have

allegedly been specified by contract and those school buildings in which there is no claim that the asbestos-containing products of Owens-Corning are involved.

The School District opposes summary judgment in favor of Owens-Corning in the three school buildings where Owens-Corning or its contracting unit, Fiberglas Engineering and Supply company (FENCO), was identified as the installer of products at those schools (Benson, Kelly and Chief Joseph); in the two school buildings where the contract specifications specified the products of Owens-Corning as the only specified products (Woodstock and Youngson); and in the one school building where Owens-Corning is identified as the installer through the affidavit of Lon Applegate.

In reply, the School District submits the affidavit of counsel, who states as follows:

> I, PETER W. PRESTON, being first duly sworn depose and say;
>
> That I have reviewed the contract documents which were part of Exhibit B submitted as part of defendant Fiberboard's motion for partial summary judgment. That I have identified the following schools; Benson, Kelly, Sitton and Chief Joseph and from the review of those documents, Owens-Corning Fiberglas or its contracting unit aka Fiberglas Engineering and Supply Company, was identified as the installer of products at that location. Additionally, I have reviewed the documents and determined that at Woodstock and Youngson under the identified contract and specification numbers, that Owens-Corning Fiberglas was the only specified product and that there were no documents approving a change from those specified documents.

Affidavit of Peter W. Preston

Owens-Corning contends that this affidavit is insufficient for the School District to meet its burden to come forward with evidence to support its claims as to these school buildings because the affidavit does not comply with the requirements of Rule 56(e) of the Federal

Rules of Civil Procedure, which requires that all documents referred to in the affidavit be attached. Counsel for the School District stated at oral argument that the contract documents are voluminous, and that "[t]he attorney's affidavit was meant to reasonably approach the proof meant to satisfy the spirit and the intent of the motion for summary judgment." Transcript, p. 24.

Rule 56(e) of the Federal Rules of Civil Procedure states that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." The documents referred to in the affidavit are

not attached thereto or served therewith. The argument of counsel that the documents referred to are too voluminous to require compliance with the Federal Rules of Civil Procedure is not persuasive. The court finds, therefore, that the affidavit of Peter Preston does not meet the requirements of Fed. R. Civ. P. 56(e).

The only school building remaining at issue in this motion is the Whitaker school building. In opposition to the motion for summary judgment as it relates to the Whitaker school building, the School District relies upon the affidavit of Lon Applegate, and "an Addendum and affidavit as identified as Exhibit C wherein Owens-Corning Fiberglas (or Fenco) is identified as the installer per the contract documents and/or through the affidavit of Mr. Applegate." Plaintiff's Response to Owens-Corning Fiberglas' Motion for Partial Summary Judgment, p. 2.

The "addendum" attached to the affidavit of Peter Preston has no evidentiary value. There are no contract documents before this court that refer to any asbestos-containing products manufactured by Owens-Corning and installed in any school building. In his affidavit, Lon Applegate states that he has "applied Owens-Corning Fiberglas products" for Fenco at the Whitaker and Adams school buildings. This does not establish that he applied any asbestos-containing products of Owens-Corning. In the absence of contract specifications or other evidence that asbestos-containing products were installed, the affidavit of Lon Applegate does not provide sufficient evidence to satisfy the burden of the School District to show that there is evidence from which a trier of fact could conclude that asbestos-containing products of Owens-Corning were installed in the Whitaker school building.

The motion for partial summary judgment of Owens-Corning is granted.

4) Motion for Partial Summary Judgment of Defendant Georgia-Pacific Corporation

* * * * *

5) Motion for Partial Summary Judgment of Defendants Armstrong Cork Company, Inc. and Armstrong World Industries, Inc.

Defendants Armstrong Cork Company, Inc. and Armstrong World Industries, Inc. (Armstrong Cork) moves the court for summary judgment in its favor as to all but forty-one of the school buildings which are listed in footnote 1 of its motion. Armstrong Cork contends that the School District has failed to show that asbestos-containing products manufactured by Armstrong Cork were installed in the school buildings which are the subject of this motion.

In response to the motion of Armstrong Cork, the School District has submitted the affidavit of counsel and an attached "addendum" listing twenty-nine schools, a contract number, and a column entitled "specification" for each of the twenty-nine schools. The affidavit of counsel states, in part: "I have reviewed the contracts in questions [sic] wherein one product is specified or one product is specified with the alternative language of 'or approved equal'." Affidavit of Peter W. Preston, p. 3.

This "addendum" is not admissible into evidence. The affidavit of counsel does not comport with Rule 56(e) of the Federal Rules of Civil Procedure. Therefore, the School District has submitted no competent evidence in opposition to the motion for summary judgment as to all of the school buildings which are the subject of this particular motion.

The motion for partial summary judgment of Armstrong Cork is granted.

6) Motion for Partial Summary Judgment of Defendant United States Gypsum Company

Defendant United States Gypsum Company (U.S. Gypsum) moves the court for summary judgment in its favor as to all school buildings but the ten which are not the subject of this motion. U.S. Gypsum argues that the School District has failed to establish that asbestos-containing products manufactured by U.S. Gypsum were installed in the school buildings which are the subject of this motion.

In response to the motion of U.S. Gypsum, the School District has submitted the affidavit of counsel and an attached "addendum" listing fifty-three schools, a contract number, and a column labelled "specification." In his affidavit, counsel for the School District states, in part: "Attached hereto is an addendum listing

those schools, which U.S. Gypsum has moved against, wherein a U.S. Gypsum product is specified as the only product under the specification or where in fact there is an allegation that the product was in fact installed." Affidavit of Peter W. preston, p.2.

This "addendum" is not admissible into evidence. The affidavit of counsel does not comply with Rule 56(e) of the Federal Rules of Civil Procedure. The school District has submitted to competent evidence that summary judgment is not appropriate as to all school buildings which are the subject of this motion.

The motion for partial summary judgment of United States Gypsum Company is granted.

7) <u>The Motion for Summary Judgment of Defendant U.S. Mineral Products Company</u>

* * * * *

8) Motion for Partial Summary Judgment of Defendant Fibreboard Corporation

Defendant Fibreboard Corporation (Fibreboard) moves the court for summary judgment in its favor as to all school buildings except for the fourteen school buildings which are not the subject of this motion. Fibreboard argues that the School District has failed to show that asbestos-containing products produced by Fibreboard were installed in the fourteen school buildings which are the subject of this motion.

In its memorandum in response to the motion for partial summary judgment of Fibreboard, the School District contends that Fibreboard should be held responsible for the installation of asbestos-containing insulation by Columbia Asbestos Company and its predecessor, Asbestos Supply. The School District submits a contract, attached as Exhibit A to its Memorandum in

Opposition, in which Columbia Asbestos Company agrees to buy from Pabco its entire requirements of "Pabco PRECISION MOLDED 85% Magnesia Insulation and Prasco High Temperature Insulation" during the life of the agreement. The School District submits the affidavit of counsel and an attached "addendum" listing sixteen schools and columns labelled "product," "contract number," and "specification." In his affidavit, counsel for the School District states that the "addendum" lists "those schools which Fibreboard has moved against wherein a Fibreboard product is specified as the only product under the specification or where in fact the plaintiff has alleged that the product was installed therein." Affidavit of Peter W. Preston, pp. 2-3.

The "addendum" has no evidentiary value. There are no contract documents in this record that establish that asbestos-containing products manufactured by

Fibreboard were installed in any school building which is the subject of this motion.

The motion for partial summary judgment of Fibreboard is granted.

9) Motion for Partial Summary Judgment of Defendant W. R. Grace & Co.-Conn.

* * * * *

10) Motion for Partial Summary Judgment of Defendant The Flintkote Company

Defendant The Flintkote Company (Flintkote) moves the court for summary judgment as to the fifty school buildings in which Flintkote products have been specified but not listed as installed and the school buildings in which the School District has failed to identify Flintkote products in any manner. Flintkote does not move for summary judgment as to the school buildings in which the products of Flintkote have been identified as installed. Flintkote asserts that there is

no evidence that its asbestos-containing products were installed in the school buildings which are the subject of this motion.

In opposition to the motion for partial summary judgment of Flintkote, the School District submits the affidavit of counsel and an attached "addendum" listing eleven schools, a contract number, and a column labelled "specification." In his affidavit, counsel explains that the "addendum" contains the names of "those schools, which Flintkote has moved against, wherein a Flintkote product is specified as the only product under the specification or wherein [sic] fact there is an allegation that the product was in fact installed." Affidavit of Peter W. Preston, p. 2.

There are no contract documents attached to the affidavit of Peter Preston. The "addendum" is not competent evidence. There is no evidence in this record that

the asbestos-containing products of Flintkote were installed in the school buildings which are the subject of this motion.

The motion for partial summary judgment of Flintkote is granted.

11) Motion for Partial Summary Judgment of Defendant A.P. Green Refractories Co.

* * * * *

12) Motion for Summary Judgment of Defendant Keene Corporation

* * * * *

CONCLUSION

* * * * * [Here the Court listed its summary judgment rulings.]

DATED this 20th day of June, 1991.

/s/ HELEN J. FRYE
United States District Judge

Supreme Court, U.S.
FILED
JUN 1 1994
OFFICE OF THE CLERK

No. 93-1769

In The

Supreme Court of the United States

October Term, 1993

SCHOOL DISTRICT No. 1J,
MULTNOMAH COUNTY, OREGON,

Petitioner,

vs.

ACandS, INC., a Pennsylvania corporation, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

RONALD SCOTT BEMIS*
STAFFORD FREY COOPER
500 Watermark Tower
88 Spring Street
Seattle, WA 98104
(206) 623-9900

THOMAS M. PETERSON
BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
(415) 442-0900

CHRISTOPHER ALAN RYCEWICZ
STEWART SOKOL & GRAY
1500 Benjamin Franklin Plaza
One S.W. Columbia
Portland, OR 97258
(503) 221-0699

**Counsel of Record for Fibreboard Corporation*

[additional counsel on inside cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 pp

DUANE A. BOSWORTH*
CHRISTOPHER F. MCCRACKEN
DAVIS WRIGHT TREMAINE
2300 First Interstate Tower
1300 S.W. Fifth Avenue
Portland, Oregon 97201
(503) 241-2300

*Counsel of Record for Armstrong Cork/Armstrong World

I. FRANKLIN HUNSAKER III*
BULLIVANT, HOUSER, BAILEY, PENDERGRASS & HOFFMAN
300 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 499-4472

*Counsel of Record for The Flintkote Company

JAMES DUMAS*
JAY W. BEATTIE
LINDSAY, HART, NEIL & WEIGLER
222 S.W. Columbia Street, Suite 1600
Portland, Oregon 97201
(503) 226-7677

*Counsel of Record for Owens-Corning Fiberglas

REX ARMSTRONG*
RICHARD A. HAYDEN
BOGLE & GATES
222 S.W. Columbia Street, Suite 1400
Portland, Oregon 97201
(503) 222-1515

THOMAS M. KITTREDGE
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, Pennsylvania 19103
(215) 963-5000

*Counsel of Record for United States Gypsum Company

QUESTIONS RESTATED

Fed. R. Civ. P. Rule 56(e) requires that affidavits submitted in opposition to a motion for summary judgment must be of a particular "form and content" – i.e., "made on personal knowledge"; "set forth such facts as would be admissible in evidence"; "show affirmatively that the affiant is competent to testify"; "attach thereto or serve[] therewith" "[s]worn or certified copies of all papers or parts thereof referred to. . . . "

The district court in this case found that petitioner's affidavits did not comply with the last of these affidavit content requirements and the court of appeals upheld the district court's summary judgment dismissals as a permissible exercise of discretion on the facts of this case.

QUESTIONS:

1. Should noncompliance with Rule 56 continue to be dealt with in the exercise of trial court discretion, as under current law and this case, or should district judges be compelled by appellate edict to consider, in opposition to summary judgment motions, affidavits that violate the express "form and content" requirements laid down in Rule 56(e), as petitioner urges?

2. Should this Court grant certiorari where petitioner has not identified any conflict between the circuits or any important question of federal law that warrants review by this Court and where petitioner only challenges a discretionary ruling by the district court?

PARTIES TO THE PROCEEDING

Petitioner School District No. 1J, Multnomah County, Oregon ("petitioner") was the plaintiff and appellant below. The following parties were defendants and appellees below: Armstrong Cork/Armstrong World ("Armstrong"); Fibreboard Corporation ("Fibreboard"); the Flintkote Company ("Flintkote"); Keene Corporation ("Keene"); Owens-Corning Fiberglas ("OCF"); and United States Gypsum Company ("U.S.G.") (collectively "Respondents").

Fibreboard Corporation is a parent company to five wholly-owned subsidiaries. All shares of stock issued to the public have been issued by Fibreboard under the name Fibreboard Corporation.

Imasco Limited is the parent company (owner) of The Flintkote Company.

Armstrong World Industries, Inc. is the parent corporation of Armstrong Cork Company; Armstrong World Industries, Inc. has no domestic subsidiaries that are not wholly owned.

United States Gypsum Company is a subsidiary of USG Corporation; United States Gypsum Company has no subsidiaries.

Owens-Corning Fiberglas has no domestic subsidiaries that are not wholly owned.

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No. 93-1769

In The

Supreme Court of the United States

October Term, 1993

SCHOOL DISTRICT No. 1J,
MULTNOMAH COUNTY, OREGON,

Petitioner,

vs.

ACandS, INC., a Pennsylvania corporation, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

Petitioner's statement concerning the opinions below is incomplete. The Ninth Circuit's opinion (reprinted in

Petitioner's Appendix 9-37) is reported at 5 F.3d 1255.[1] The decision of the District Court granting summary judgment (Pet.App. 52-74) is reported at 767 F.Supp. 1051. The decision of the district court denying petitioner's motions for rehearing and reconsideration (Pet.App. 38-51) is reported at 139 F.R.D. 164.

JURISDICTION

Petitioner's jurisdictional statement is partially inaccurate. The opinion of the Ninth Circuit was filed on September 24, 1993, not September 22.

STATEMENT OF THE CASE

Petitioner filed a complaint claiming that 105 or more of its buildings in Multnomah County, Oregon were damaged by asbestos products. Pet.App. 18. Petitioner sued each of the respondents (six in number) and others, claiming that each was liable in tort under Oregon law for asbestos-containing products allegedly installed in its buildings. Many years ago, respondents manufactured products that contained asbestos, and some of those products were amenable to use in building construction.

---

[1] Petitioner's Appendix will be cited in this brief as "Pet.App." The copy of the Ninth Circuit Opinion included in Pet.App. is missing page 11118 (*see* Pet.App. 31-32). That page is included as Respondents' Appendix 1, which is bound following this brief.

Emphasis has been added in quoted material unless otherwise indicated.

Under Oregon tort law, petitioner had the burden of proving the causal connection between each manufacturer's asbestos-containing products and any injury claimed to result from the installation of such products in a particular building. *See Senn v. Merrill-Dow Pharmaceuticals*, 305 Or. 256, 751 P.2d 215 (1988).

Respondents each filed a motion for summary judgment. This Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), allows a defendant to move for summary judgment on the basis that the plaintiff cannot adduce evidence necessary to support one or more essential elements of the plaintiff's *prima facie* case. Accordingly, respondents sought summary judgment on the basis that petitioner lacked evidence showing that asbestos-containing products manufactured by respondents had been installed in particular buildings included within the 105 described in the complaint. Pet.App. 22. Those "rounds" of summary judgment motions were filed after the conclusion of many months of product identification discovery. The district court's rulings on summary judgment were not made in isolation. They were preceded by petitioner's repeated failures to simply and specifically identify each respondent's alleged asbestos-containing products in its buildings, despite a number of court orders requiring petitioner to do so.

First, petitioner did not respond substantively to respondents' joint interrogatories requesting specific product identification at each building. As a result, respondents sought a discovery management conference and an order compelling interrogatory answers. (CR

#118).[2] Second, after the discovery conference, the district court ordered petitioner to provide specific product identification information for each building. (SER 1-2, CR #131).[3] Third, after petitioner again sought to avoid the obligation of answering the interrogatories, the district court, by second order, *again* directed that petitioner provide complete and accurate answers to the interrogatories. (SER 6, 10-11, CR #154). Finally, upon later granting petitioner additional months to answer the interrogatories, the district court warned petitioner in a third order that "[n]o further extensions will be allowed absent extraordinary circumstances." (SER 13, CR #163). After the final cutoff for petitioner's interrogatory responses, respondents filed their summary judgment motions for dismissal for lack of product identification.[4]

Under *Celotex* and Rule 56,[5] once respondents sought summary judgment, it was petitioner's burden to demonstrate the existence of a genuine issue of material fact preventing summary judgment. As applied in this case, this standard required a showing that respondents' products had in fact been installed in particular buildings. In the face of the summary judgment motions, petitioner could no longer rest on its cursory pleading that respondents were liable for buildings on an undifferentiated

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[2] "CR" refers to the Clerk's Record filed in the district court.

[3] "SER" refers to the Supplemental Excerpts of Record filed in the Ninth Circuit by respondents.

[4] A partial history of the case is included in the Ninth Circuit and district court opinions. Pet.App. 18-37, 52-74.

[5] All "Rule" citations are to the Federal Rules of Civil Procedure, unless otherwise noted.

basis. Rather, petitioner had to adduce "the kinds of evidentiary materials listed in Rule 56(c)" (*Celotex*, 477 U.S. at 324) in order to overcome respondents' motions.

Petitioner submitted affidavits of its attorney, Peter Preston, in an attempted discharge of its *Celotex* summary judgment burden. Those affidavits were all materially similar. Each recited that attorney Preston reviewed various documents in petitioner's files and found within those documents some referred-to parts thereof which (allegedly) indicated that particular brands of products may have been called for in some proposed construction specifications for particular buildings.[6] Pet.App. 24.

Rule 56(e) provides that any affidavit offered in opposition to a summary judgment motion *must* have attached to it "[s]worn or certified copies of all papers or parts thereof referred to in [the] affidavit . . . ." Petitioner concedes in this Court, as it has done below, that the Preston affidavits "do not fully comply with Rule 56(e) . . . ." Pet. 10. The documents or parts thereof referred to in the Preston affidavits were not attached thereto or submitted to the district court in opposition to respondents' motions. Thus, the contract documents, and particularly the pages of supposed brand specifications, relied upon by petitioner as the evidentiary basis to overcome respondents' summary judgment motions were not placed before the district court. Pet.App. 24-26.

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[6] Contrary to petitioner's statement of the case at Pet. 5-6, attorney Preston's affidavits and addenda did not state or show that particular products were actually "installed" in particular buildings.

The district court granted respondents' motions because the Preston affidavits did not comply with the Rule 56(e) document attachment requirement.[7] Absent the required documents, petitioner lacked competent evidence in opposition to respondents' motions for summary judgment.[8]

On appeal, the Ninth Circuit reviewed the district court rulings regarding the affidavits under an abuse of discretion standard and affirmed. The Ninth Circuit based its decision on several considerations. (1) "The context in which the district court ruled on the . . . motions [for summary judgment] . . . was preceded by a discovery battle" in which petitioner refused to respond to discovery identifying products installed in particular buildings and was ordered to make such discovery, but responded in a fashion less complete than the district court had specifically ordered. Pet.App. 23. (2) The documents omitted from the affidavits appeared to be the *only* evidence even potentially holding respondents in the case, and given the central importance of those alleged documents, petitioner's failure to attach them was remarkable. (3) Petitioner had demonstrated an ability to

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[7] Petitioner's opposition also did not comply with Local Rule 220-9(c) [formerly Local Rule 220-10(c)], which provided in pertinent part: "the filing party shall extract and highlight only the relevant portions of each referenced document. Photocopies of extracted pages, with appropriate identification and highlighting will be adequate."

[8] Pet.App. 26, 63-64, 65, 67, 68, 69, 71-72, 73-74. Furthermore, petitioner had stipulated at the hearing that the "record is closed today; there is no more supplementation by [petitioner's] counsel." SER 19; *see generally* Pet.App. 43.

submit relevant portions of similar documents when petitioner chose to do so, thus belying the contention that petitioner could not comply with the Rule 56(e) attachment requirement without undue burden. Pet.App. 26-27.

In the courts below, petitioner also challenged the district court's refusal to reconsider the affidavits subsequent to the summary judgment rulings, when petitioner filed more than 21,000 unindexed, unorganized pages of previously available alleged contract documents in the district court. The Ninth Circuit affirmed the denial of reconsideration as a legitimate exercise of discretion by the district court. Pet.App. 29-30. Petitioner does not seek review of that ruling in this Court.

REASONS TO DENY THE WRIT

This case does not meet the Supreme Court Rule 10.1(a) criteria for review. The law is uniform. There is no conflict. There is no legal issue of importance. Indeed, nothing in the law is currently unresolved.

Rule 56(e) provides that any affidavit filed in opposition to a motion for summary judgment *must* have attached to it sworn or certified copies of any portions of documents referred to in the affidavit. The plain wording of the Rule applies directly to the facts of this case. No court has suggested that the document attachment requirement of Rule 56(e) is inapplicable or overridden by other provisions of law, be they statutes, rules or decisions. The attachment requirement is basic and

mandatory; it means what it says.[9] While there are cases where courts have exercised discretion in various ways in addressing or remedying noncompliance with Rule 56(e), a conflict of decision requiring resolution by this Court does not exist. Those cases merely demonstrate application of judicial discretion by lower courts to the unique facts of each different case.

What should be relevant in this Court under Supreme Court Rule 10.1(a) is that no authority supports the argument that affidavits suffice to defeat summary judgment when they do not comply with Rule 56(e). Petitioner's argument can be summarized as follows: inadmissible, incompetent, noncomplying affidavits may be used to defeat summary judgment motions as a matter of law. Having set for itself this embarrassingly low standard of summary judgment practice, petitioner claims to have met this erroneous standard because petitioner's affidavits are inadmissible, incomplete, and non-complying.

In support of its argument, petitioner posits false conflict between Rule 56(e)'s document attachment

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[9] *See, e.g., Washington v. Maricopa County*, 143 F.2d 871, 872 (9th Cir, 1944), cert. denied, 327 U.S. 799 (1946) ("no sworn or certified copies of any such paper was attached to or served with either affidavit. Hence, all references to such papers should have been disregarded."); *Peterson v. United States*, 694 F.2d 943, 945 (3d Cir. 1982) (the attachment requirement is a "clear mandate" drawn from the "unambiguous language of the rule," and failure to attach key documents to affidavit violated Rule 56(e)); 10 A, Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2722, at 57-58 (1983) ("if written documents are relied upon they actually must be exhibited; affidavits that purport to describe a document's substance or an interpretation of its contents are insufficient").

requirement, Rule 56(c), and *Celotex*. But neither *Celotex* nor Rule 56(c) espouses the rule that deficient affidavits must be considered in opposition to summary judgment even when they violate Rule 56 itself.

Rule 56(c) sets forth the various types of evidentiary materials that may be proffered in opposition to summary judgment. Rule 56(c) is not in conflict with Rule 56(e). The two Rules are complementary. Rule 56(c) mentions affidavits; Rule 56(e) governs their "form and content." An affidavit lacking the "form and content" required by Rule 56(e) is no longer an "affidavit" within the contemplation of Rule 56(c). In addition, Rule 56(c) does not deal at all with the admissibility of an affidavit under the Federal Rules of Evidence. Insofar as admissibility is addressed, Rule 56(e) requires that affidavits show: affiant's competence, personal knowledge, and "such facts as would be admissible in evidence."

Contrary to petitioner's erroneous argument, this Court's decision in *Celotex* does not even address the Rule 56(e) document attachment requirement. Thus, *Celotex* could hardly be inconsistent with the lower court decisions to enforce Rule 56(e) based on the facts and history of this case.

Apart from a lack of legal merit, this Court should deny certiorari because the rule petitioner seeks is inimical to the administration of justice. Petitioner would turn the requirements of Rule 56 into mere aspirations. But if noncompliance with Rule 56 carries little penalty, as petitioner would have it, deficient submissions will become more prevalent. Rather than take away penalties for deficient practice, the better course is to leave the whole matter of noncompliance and penalty to the discretion of the trial judge.

Petitioner points out the value of summary judgment in getting to the merits of cases and weeding out cases that lack issues for trial. Pet. 9-10. But the requirement that the relevant portions of important documents be placed before the court, and not shielded behind a veil of affiant characterization, precisely furthers the goal of resolving cases based on the *evidence*.

Rule 56(e) helps implement this Court's decisions in *Celotex*, *Matsushita*, and *Liberty Lobby*.[10] Those decisions require that a plaintiff demonstrate an ability to introduce evidence on matters of fact as to which the plaintiff would have the burden of proof at trial. Rule 56(e) performs the complementary function of requiring a plaintiff to showcase the documentary evidence in cases where the plaintiff's proposed proof consists of documentary evidence. Neither *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77 (5th Cir. 1987), nor *Jackson v. Mississippi*, 644 F.2d 1142, 1144 (5th Cir. 1981) (Pet. 11), is to the contrary. Indeed, neither involved the issue presented here. *Lodge Hall* did not involve or address the attachment requirement. It involved whether verified pleadings could be considered by the court in lieu of affidavits. In *Jackson*, the referenced documents were attached to the party's attorney's affidavit; there, the issue was whether the attorney was competent to testify as to matters stated in the attachments.

Petitioner contends that the Preston affidavits "set forth sufficient evidence to avoid summary judgment" (Pet. 10) and that "no doubt evidence exists to avoid

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[10] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

summary judgment." *Id.* The court of appeals correctly answered those grandiose assertions: "Lacking [the alleged referred-to documents], Preston's affidavits were nothing more than an attorney's argument lacking evidentiary support." Pet.App. 26.

CONCLUSION

The petition should be denied.

DATED: June 1, 1994

Respectfully submitted,

RONALD SCOTT BEMIS*
STAFFORD FREY COOPER
500 Watermark Tower
88 Spring Street
Seattle, Washington 98104
(206) 623-9900

CHRISTOPHER ALAN RYCEWICZ
STEWART SOKOL & GRAY
1700 Benjamin Franklin Plaza
One S.W. Columbia
Portland, Oregon 97258
(503) 221-0699

THOMAS M. PETERSON
BROBECK, PHLEGER & HARRISON
Spear Street Tower
One Market Plaza
San Francisco, CA 94105
(415) 442-0900

**Counsel of Record for Fibreboard Corporation*

DUANE A. BOSWORTH*
CHRISTOPHER F. MCCRACKEN
DAVIS WRIGHT TREMAINE
2300 First Interstate Tower
1300 S.W. Fifth Avenue
Portland, Oregon 97201
(503) 241-2300

**Counsel of Record for Armstrong Cork/Armstrong World*

I. FRANKLIN HUNSAKER III*
BULLIVANT, HOUSER, BAILEY,
PENDERGRASS & HOFFMAN
300 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 499-4472

**Counsel of Record for The Flintkote Company*

JAMES DUMAS*
JAY W. BEATTIE
LINDSAY, HART, NEIL & WEIGLER
222 S.W. Columbia Street,
Suite 1600
Portland, Oregon 97201
(503) 226-7677

**Counsel of Record for Owens-Corning Fiberglas*

REX ARMSTRONG*
RICHARD A. HAYDEN
BOGLE & GATES
222 S.W. Columbia Street,
Suite 1400
Portland, Oregon 97201
(503) 222-1515

THOMAS M. KITTREDGE
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, Pennsylvania 19103
(215) 963-5000

**Counsel of Record for*
United States Gypsum Company

APPENDIX

made no finding that the affidavits filed by the School District were or were not "sham" affidavits generated soley in order to create a genuine issue of material fact.

[8] However, this is not the end of our analysis. Summary judgment is not precluded simply because there is a dispute of some facts in a case. To defeat a motion for summary judgment, the nonmoving party must present facts in support of the issues on which it would bear the burden of proof at trial, there must be probative evidence of those facts, and the facts must be uncontroverted or at least create a *genuine* issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) ("If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)). When "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *First Nat. Bank v. City Service Co.*, 391 U.S. 253, 289 (1968)).

[9] OCF and Fibreboard have requested summary judgment as to those schools where none of their products were identified at the School District's interrogatory response. The response is powerful evidence that neither Fibreboard nor OCF asbestos-containing products are in those schools. We examine the affidavits presented by the School District to determine if the affidavits, considered together with the School District's contrary interrogatory

response, present a *genuine* factual dispute of a material issue.

The School District contends that an OCF asbestos product was installed at Edwards school. It relies on the affidavit of Robert Kramer, an asbestos worker who recalls installing an OCF asbestos product at Edwards. Kramer's affidavit, however, is based on his distant memory. More significantly, it ever contradicts the School District's interrogatory response which was based on the School District's examination of applicable

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